

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 17, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHELLE C.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:17-cv-00339-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 14, 15

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 14, 15. The parties consented to proceed before a magistrate judge. ECF No. 6. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion, ECF No. 14, and grants Defendant's motion, ECF No. 15.

ORDER - 1

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
2 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
4 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within
9 the meaning of the Social Security Act. First, the claimant must be “unable to
10 engage in any substantial gainful activity by reason of any medically determinable
11 physical or mental impairment which can be expected to result in death or which
12 has lasted or can be expected to last for a continuous period of not less than twelve
13 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
14 impairment must be “of such severity that [she] is not only unable to do [her]
15 previous work[,], but cannot, considering [her] age, education, and work
16 experience, engage in any other kind of substantial gainful work which exists in
17 the national economy.” 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

18 The Commissioner established a five-step sequential analysis to determine
19 whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-

1 (v), 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's
2 work activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is
3 engaged in "substantial gainful activity," the Commissioner must find that the
4 claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
8 claimant suffers from "any impairment or combination of impairments which
9 significantly limits [her] physical or mental ability to do basic work activities," the
10 analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
11 claimant's impairment does not satisfy this severity threshold, however, the
12 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
13 404.1520(c), 416.920(c).

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant can perform work that she has performed in the past (past
10 relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the
11 claimant can perform past relevant work, the Commissioner must find that the
12 claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant is
13 incapable of performing such work, the analysis proceeds to step five.

14 At step five, the Commissioner considers whether, in view of the claimant's
15 RFC, the claimant can perform other work in the national economy. 20 C.F.R. §§
16 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination, the
17 Commissioner must also consider vocational factors such as the claimant's age,
18 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
19 416.920(a)(4)(v). If the claimant can adjust to other work, the Commissioner must

1 find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).
2 If the claimant is not capable of adjusting to other work, analysis concludes with a
3 finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R.
4 §§ 404.1520(g)(1), 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant
8 can perform other work; and (2) such work “exists in significant numbers in the
9 national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,
10 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 On January 15, 2014, Plaintiff applied both for child’s insurance disability
13 benefits under Title II and Title XVI supplemental security income benefits
14 alleging a disability onset date of October 1, 2010. Tr. 220-33. The application
15 was denied initially, Tr. 141-47, and on reconsideration, Tr. 151-54. Plaintiff
16 appeared before an administrative law judge (ALJ) on March 29, 2016. Tr. 52-94.
17 On May 12, 2016, the ALJ denied Plaintiff’s claim. Tr. 20-51.

18 At step one of the sequential evaluation process, the ALJ found Plaintiff has
19 not engaged in substantial gainful activity since the alleged onset date. Tr. 26. At

1 step two, the ALJ found that Plaintiff has the following severe impairments:
2 depressive disorder, bereavement disorder, anxiety, and non-epileptic “staring
3 spells.” Tr. 26.

4 At step three, the ALJ found Plaintiff does not have an impairment or
5 combination of impairments that meets or medically equals the severity of a listed
6 impairment. Tr. 29. The ALJ then concluded that Plaintiff has the RFC to
7 perform:

8 medium work . . . , which consists of lifting and carrying up to 50
9 pounds occasionally and up to 25 pounds frequently, however,
[Plaintiff] has no limitations regarding sitting, standing, or walking.
[Plaintiff] also has the following limitations: [Plaintiff] must avoid
10 unprotected heights and cannot operate heavy machinery. [Plaintiff]
can never climb ropes, ladders or scaffolds. [Plaintiff] should avoid
11 concentrated exposure to odors, dust, gases, and fumes. [Plaintiff] is
capable of simple and routine tasks with occasional detailed work.
12 [Plaintiff] can have superficial brief contact with the general public and
occasional non-collaborative contact with coworkers. [Plaintiff]
13 functions best working independently and works better with objects,
rather than people. [Plaintiff] is limited to only ordinary production
14 requirements.

15 Tr. 32.

16 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 43. At
17 step five, the ALJ found that, considering Plaintiff’s age, education, work
18 experience, RFC, and testimony from the vocational expert, there were jobs that
19 existed in significant numbers in the national economy that Plaintiff could perform,

20 ORDER - 7

1 such as: stuffer, toy assembler, and basket filler. Tr. 44-45. Therefore, the ALJ
2 concluded Plaintiff was not under a disability, as defined in the Social Security
3 Act, from the alleged onset date of October 1, 2010, though the date of the
4 decision. Tr. 45.

5 On August 10, 2017, the Appeals Council denied review of the ALJ's
6 decision, Tr. 1-9, making the ALJ's decision the Commissioner's final decision for
7 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

8 ISSUES

9 Plaintiff seeks judicial review of the Commissioner's final decision denying
10 her child disability insurance benefits under Title II and supplemental security
11 income benefits under Title XVI of the Social Security Act. Plaintiff raises the
12 following issues for review:

- 13 1. Whether the ALJ properly identified Plaintiff's severe physical
14 impairments at step two;
- 15 2. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 16 3. Whether the ALJ properly evaluated the medical opinion evidence;
- 17 4. Whether the ALJ properly incorporated the opined limitations into the
18 RFC; and

5. Whether the ALJ conducted a proper step-five analysis.

ECF No. 14 at 12.

DISCUSSION

A. Step Two: Severe Impairments

Plaintiff contends the ALJ erred by failing to identify her gastrointestinal problems as a severe impairment at step two. ECF No. 14 at 14.

At step two of the sequential process, the ALJ must determine whether the claimant suffers from a “severe” impairment, i.e., one that significantly limits her physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). To show a severe impairment, the claimant must first prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings. 20 C.F.R. §§ 404.1508, 416.908 (2010).¹ The claimant’s own statement of symptoms alone will not suffice. *Id.*

¹ As of March 27, 2017, 20 C.F.R. § 416.908 was removed and reserved and 20 C.F.R. § 416.921 was revised. The Court applies the version that was in effect at the time of the ALJ's decision.

1 An impairment may be found to be not severe when “medical evidence
2 establishes only a slight abnormality or a combination of slight abnormalities
3 which would have no more than a minimal effect on an individual’s ability to
4 work.” Soc. Sec. Rlg. (SSR) 85-28 at *3. Similarly, an impairment is not severe if
5 it does not significantly limit a claimant’s physical or mental ability to do basic
6 work activities, such as walking, standing, sitting, lifting, pushing, pulling,
7 reaching, carrying, handling, seeing, hearing, speaking, understanding, carrying out
8 and remembering simple instructions, dealing with changes in a routine work
9 setting, and responding appropriately to supervision, coworkers, and usual work
10 situations. 20 C.F.R. § 416.921(a) (2010);² SSR 85-28.

11 Step two is “a de minimus screening device [used] to dispose of groundless
12 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). “Thus, applying
13 our normal standard of review to the requirements of step two, [the Court] must
14 determine whether the ALJ had substantial evidence to find that the medical
15 evidence clearly established that [Plaintiff] did not have a medically severe
16

17
18 ² As of March 27, 2017, 20 C.F.R. §§ 416.921 and 416.922 were amended. The
19 Court applies the version that was in effect at the time of the ALJ’s decision.

1 impairment or combination of impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687
2 (9th Cir. 2005).

3 At step two, the ALJ concluded that Plaintiff had the severe impairments of
4 depressive disorder, bereavement disorder, anxiety, and non-epileptic “staring
5 spells.” Tr. 26. After detailing the medical evidence pertaining to Plaintiff’s
6 gastrointestinal issues, the ALJ found the objective medical evidence did not
7 support a finding that Plaintiff’s gastrointestinal issues caused more than a minimal
8 limitation in her ability to perform basic work activities. Tr. 26-27 (citing Tr. 318-
9 19, 326, 331-68, 1140, 1184). Plaintiff argues, without citation to a specific
10 record, that her providers, including Dr. Arnold Cohen, considered her
11 gastroparesis to be a severe impairment. ECF No. 14 at 14. This argument is
12 unpersuasive for several reasons.

13 First, Plaintiff failed to support her asserted argument with citation to the
14 record. Factual and legal support must accompany contentions. *Indep. Towers of*
15 *Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003). By failing to support her
16 asserted contention, Plaintiff waived this argument. *See id.*; *Carmickle v. Comm’r,*
17 *Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008).

18 Second, Plaintiff’s contention lacks merit. While Dr. Cohen commented that
19 Plaintiff’s stomach issues were a serious medical issue, a review of Dr. Cohen’s

1 records demonstrate that he considered Plaintiff's gastrointestinal complaints to be
2 adequately treated by medication. Tr. 318-30, 495-513, 1081-1101, 1281-83,
3 1293-97. Moreover, Dr. Cohen did not assess any functional limitations as a result
4 of Plaintiff's stomach complaints. *See, e.g., Morgan v. Comm'r Soc. Sec. Admin.*,
5 169 F.3d 595, 601 (9th Cir. 1999) (permitting an ALJ to discount a medical
6 opinion that does not translate a claimant's symptoms into specific functional
7 deficits which preclude work activity).

8 Further, while the evidence could support a different finding than that
9 reached by the ALJ, the ALJ's finding that Plaintiff's gastrointestinal issues were
10 not a severe impairment is a rational interpretation of the record. *See Burch v.*
11 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). Moreover, any error at step two is
12 harmless because the ALJ resolved step two in Plaintiff's favor by finding severe
13 impairments and continued the sequential analysis through step five. Also, the
14 ALJ considered Plaintiff's non-severe gastric issues when formulating the RFC:

15 When considered in conjunction with one another and [Plaintiff's]
16 severe impairments, non-severe impairments can potentially affect
17 [Plaintiff's] residual functional capacity. In recognition of this, and in
18 accordance with the regulations, [Plaintiff's] non-severe impairments
19

1 have been considered when formulating the residual functional
2 capacity below.

3 Tr. 29; *see Burch*, 400 F.3d at 682; *Molina*, 674 F.3d at 1115. Finally, as is
4 explained below, Plaintiff failed to identify a functional limitation that was not
5 incorporated into the RFC.

6 **B. Plaintiff's Symptom Claims**

7 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
8 convincing in discrediting her symptom claims. ECF No. 14 at 15-16.

9 An ALJ engages in a two-step analysis to determine whether to discount a
10 claimant's testimony regarding subjective symptoms. SSR 16-3p, 2016 WL
11 1119029, at *2.³ "First, the ALJ must determine whether there is objective
12
13
14

15 ³ At the time of the ALJ's decision in May 2016, the regulation that governed the
16 evaluation of symptom claims was SSR 16-3p, which superseded SSR 96-7p
17 effective March 24, 2016. SSR 16-3p; Titles II and XVI: Evaluation of Symptoms
18 in Disability Claims, 81 Fed. Reg. 15776, 15776 (Mar. 24, 2016). The ALJ's
19 decision did not cite SSR 16-3p, but cited SSR 96-4p, which was rescinded

1 medical evidence of an underlying impairment which could reasonably be
2 expected to produce the pain or other symptoms alleged.” *Molina*, 674 F.3d at
3 1112 (quotation marks omitted). “The claimant is not required to show that her
4 impairment could reasonably be expected to cause the severity of the symptom she
5 has alleged; she need only show that it could reasonably have caused some degree
6 of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

7 Second, “[i]f the claimant meets the first test and there is no evidence of
8 malingering, the ALJ can only reject the claimant’s testimony about the severity of
9 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
10 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
11 omitted). General findings are insufficient. The ALJ must identify what symptom
12 claims are being discounted and what evidence undermines these claims. *Id.*
13 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v. Barnhart*,
14 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why
15 she discounted claimant’s symptom claims)). “The clear and convincing

16 _____
17
18 effective June 14, 2018, in favor of the more comprehensive SSR 16-3p. Neither
19 party argued any error in this regard.

1 [evidence] standard is the most demanding required in Social Security cases.”

2 *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r*
3 *of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

4 Factors to be considered in evaluating the intensity, persistence, and limiting
5 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
6 duration, frequency, and intensity of pain or other symptoms; 3) factors that
7 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
8 side effects of any medication the claimant takes or taken to alleviate pain or other
9 symptoms; 5) treatment, other than medication, the claimant receives or received
10 for relief of pain or other symptoms; 6) any measures other than treatment the
11 claimant uses or used to relieve pain or other symptoms; and 7) any other factors
12 concerning the claimant’s functional limitations and restrictions due to pain or
13 other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. § 416.929(c)(1)-
14 (3). The ALJ is instructed to “consider all of the evidence in an individual’s
15 record,” “to determine how symptoms limit ability to perform work-related
16 activities.” SSR 16-3p, 2016 WL 1119029, at *2.

17 While the ALJ determined that Plaintiff’s medically determinable
18 impairments could reasonably be expected to cause some of the alleged symptoms,

1 the ALJ discounted Plaintiff's claims concerning the intensity, persistence, and
2 limiting effects of the symptoms. Tr. 34.

3 *1. Inconsistent with Objective Medical Evidence*

4 The ALJ found the severity of Plaintiff's reported symptoms were
5 unsupported by the objective medical evidence. Tr. 34-39. An ALJ may not
6 discredit a claimant's symptom testimony and deny benefits solely because the
7 degree of the symptoms alleged is not supported by objective medical evidence.
8 *Burch*, 400 F.3d at 680 (Minimal objective evidence is a factor which may be
9 relied upon to discount a claimant's testimony, although it may not be the only
10 factor); *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v.*
11 *Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601
12 (9th Cir. 1989). However, the medical evidence is a relevant factor in determining
13 the severity of a claimant's symptoms and their disabling effects. *Rollins*, 261
14 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2).

15 Here, without citation to the record, Plaintiff contends there is objective
16 evidence that Plaintiff's gastrointestinal and neurological conditions affect her
17 ability to work. By failing to support her contention with law or facts, Plaintiff
18 waived this argument. *See Indep. Towers of Wash.*, 350 F.3d at 929; *Carmickle*,
19 533 F.3d at 1161 n.2. Regardless, Plaintiff's contention lacks merit. After a

comprehensive summary of Plaintiff's medical history, the ALJ rationally concluded that the objective medical evidence, including the physical evaluations and test results, did not corroborate Plaintiff's reported symptoms. *See Tommasetti v. Astrue*, 533 F.3d 1038, 1040 (9th Cir. 2008) ("[W]hen the evidence is susceptible to more than one rational interpretation," the court will not reverse the ALJ's decision.). This rational finding is supported by substantial evidence. *See, e.g.,* Tr. 318-30, 339-43, 346-47, 439-41, 444, 448, 495-513, 613, 775-76, 780, 814, 889-90, 1081-1101, 1127-28, 1156-57, 1217-30, 1277, 1281-83, 1293-97, 1397-98, 1455-56. For instance, on December 9, 2015, Dr. Cohen stated that Plaintiff was "doing remarkably well" and her "delayed gastric emptying seems to be reasonably well controlled with diet and her irritable bowel component is stable." Tr. 1293. Also, as is discussed below, the counseling treatment notes indicate that Plaintiff's depression, anxiety, and sleep improved while Plaintiff was in counseling and her medication managed. Tr. 461, 483, 720, 712. And testing in January 2016 revealed normal electroencephalogram (EEG) telemetry and minor seizure activity that was consistent with a nonepileptic, psychogenic event. Tr. 1217-30. It was recommended that Plaintiff cease using Topirmate and later noted that thereafter Plaintiff had no more seizures. Tr. 1397. Lack of objective medical

1 evidence supporting the reported disabling claims was a clear and convincing
2 reason to discount Plaintiff's disabling claims.

3 2. *Improvement with Treatment*

4 The ALJ discounted Plaintiff's symptom claims because her conditions
5 improved with treatment. Tr. 36-38. The effectiveness of treatment is a relevant
6 factor in determining the severity of a claimant's symptoms. 20 C.F.R. §§
7 404.1529(c)(3), 416.929(c)(3) (2011); *see Warre v. Comm'r of Soc. Sec. Admin.*,
8 439 F.3d 1001, 1006 (9th Cir. 2006); *Tommasetti*, 533 F.3d at 1040. Here, the
9 record supports the ALJ's conclusion that Plaintiff's mental-health conditions were
10 largely situational and improved (and would improve) with therapy, medication
11 management, and life skills, such as good sleep habits, walking, and journaling.
12 Tr. 461 (reporting that anxiety is manageable, and mood has dramatically
13 improved); Tr. 483 (noting that Plaintiff considered her depression to have
14 resolved); Tr. 720 (reporting "significantly less depression"); Tr. 604-06 (reporting
15 no seizures for over six months and normal labs); Tr. 712 (reporting that
16 counseling is helping). While the record contains conflicting evidence as to
17 whether Plaintiff's headaches were consistently controlled, *see* Tr. 1398 (reporting
18 that Plaintiff had chronic migraines six weeks before the administrative hearing), it
19 was the ALJ's role to resolve conflicts and ambiguity in the evidence. *See*

1 *Morgan*, 169 F.3d at 599-600. The ALJ’s finding that Plaintiff’s reports of
2 disabling headaches were inconsistent with the treatment and medication records is
3 a rational interpretation of the entire record and is supported by substantial
4 evidence. *See, e.g.*, Tr. 439 (“Doing well with changes”); Tr. 455 (feeling better
5 on Zoloft); Tr. 489-94 (noting no seizures for a one-year period and that headaches
6 were medication-overuse headaches); Tr. 526 (reporting improved motivation with
7 counseling); Tr. 557, 608 (medication helping relieve depression); Tr. 576 (noting
8 that depression was situational); Tr. 676-751, 992-97, 1314-18 (reflecting that
9 counseling helps); Tr. 814 (noting no seizures lately); Tr. 1041-42 (reporting
10 stability with medication); Tr. 1055 (noting that good sleep practices improved
11 sleep); Tr. 1093, 1099, 1293 (improving delayed gastric emptying with rigorous
12 diet). That treatment improved Plaintiff’s conditions was a clear and convincing
13 reason to discount Plaintiff’s reported disabling symptoms.

14 Moreover, Plaintiff failed to challenge the ALJ’s conclusion that Plaintiff’s
15 reported symptoms improved with treatment. Thus, any challenge is waived. *See*
16 *Carmickle*, 533 F.3d at 1161 n.2 (determining the court may decline to address on
17 the merits issues not argued with specificity); *Kim v. Kang*, 154 F.3d 996, 1000
18 (9th Cir. 1998) (recognizing that on appeal issues not “specifically and distinctly
19 argued” in the party’s opening brief may be disregarded by the court).

1 3. *Inconsistent with Daily Living Activities*

2 The ALJ also evaluated Plaintiff's daily living activities against her
3 disabling claims. Tr. 33, 35. It is reasonable for an ALJ to consider a claimant's
4 activities that undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a
5 claimant can spend a substantial part of her day engaged in pursuits involving the
6 performance of exertional or non-exertional functions, the ALJ may find these
7 activities inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at
8 603; *Molina*, 674 F.3d at 1113. "While a claimant need not vegetate in a dark
9 room in order to be eligible for benefits, the ALJ may discount a claimant's
10 symptom claims when the claimant reports participation in everyday activities
11 indicating capacities that are transferable to a work setting" or when activities
12 "contradict claims of a totally debilitating impairment." *Molina*, 674 F.3d at 1112-
13 13. Here, Plaintiff failed to challenge the ALJ's findings as to her daily living
14 activities. Thus, any challenge is waived. *See Carmickle*, 533 F.3d at 1161 n.2.
15 Regardless, Plaintiff's unsupported contention fails on the merits because the
16 identified activities of daily living, including running errands, watching television,
17 spending time on the Internet, doing laundry, helping with dishes, socializing with
18 friends, and attending community college contradict Plaintiff's disabling claims.

1 Tr. 485, 580. This was a clear and convincing reason supported by substantial
2 evidence to discount Plaintiff's symptom claims.

3 *4. Medication Noncompliance*

4 Defendant argues that the ALJ discounted Plaintiff's reported symptoms
5 because of Plaintiff's failure to follow a prescribed course of treatment. ECF No.
6 15 at 13. Tr. 37. Unexplained, or inadequately explained, failure to seek
7 treatment or follow a prescribed course of treatment may be the basis for an
8 adverse credibility finding unless there is good reason for the failure. *Orn*, 495
9 F.3d at 638. Here, the ALJ noted that Plaintiff's three convulsions in September
10 2012 were the result of medication noncompliance. Tr. 37 (citing Tr. 489). But
11 the ALJ did not specifically discount Plaintiff's reported symptoms because of this
12 noncompliance. To rely on noncompliance as a basis to discount Plaintiff's
13 reported symptoms, the ALJ was required to give "specific, clear and convincing
14 reasons" for the rejection. *Ghanim*, 763 F.3d at 1163. Here, to the extent that the
15 ALJ may have offered this reasoning, the ALJ's general finding was insufficient.

16 Even if the ALJ's general finding was sufficient, any decision to discount
17 Plaintiff's symptoms as a result of this reported medication noncompliance is not
18 supported by substantial evidence. The record is unclear as to whether Dr. David
19 Henzler's reported "medication noncompliance" reflected an intentional decision

1 by Plaintiff to stop taking medications for two days, Tr. 492, or an intentional
2 overdose of pills following the one-year anniversary of her mother's death, Tr.
3 528. If this "medication noncompliance" was due to Plaintiff's mental-health
4 condition, then would have been improper for the ALJ to discount Plaintiff's
5 reported symptoms for this reason. *See Nguyen v. Chater*, 100 F.3d 1462, 1465
6 (9th Cir. 1996) (recognizing when noncompliance is partly due to a claimant's
7 mental-health condition, it may be inappropriate to consider a claimant's lack of
8 mental-health treatment when evaluating the claimant's failure to participate in
9 treatment). Further, the remainder of the record indicates that Plaintiff otherwise
10 complied with medication recommendations unless a prescribed medication
11 worsened her depression. Tr. 737-49 (taking medications as prescribed); Tr. 800-
12 42, 1249 (no problems taking medications); Tr. 993 (planning to continue taking
13 medications); Tr. 469 (taking medications on a consistent basis); Tr. 978 (taking
14 anticonvulsants reliably); Tr. 333 (ceasing seizure medicine because it made her
15 depression worse). Regarding recommended journaling, the record is conflicting
16 as to whether Plaintiff consistently kept a journal as recommended. *Compare* Tr.
17 450, 452 (not keeping food log as recommended) *and* Tr. 768 (Plaintiff was

1 “responsive to prompts, homework, journaling, and activities” and had good
2 attendance record for the year therapy was provided).

3 Even if the ALJ erred by discounting Plaintiff’s symptom claims because of
4 treatment noncompliance, this error is harmless because, as discussed above, the
5 ALJ provided other legally sufficient reasons to discount Plaintiff’s reported
6 symptoms. *See Carmickle*, 533 F.3d at 1163 (upholding an adverse credibility
7 finding where only two of the ALJ’s four reasons to discredit the claimant were
8 valid); *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir.
9 2004); *Tommasetti*, 533 F.3d at 1038.⁴

10 C. RFC

11 Plaintiff contends the RFC failed to account for her mental and physical
12 limitations. ECF No. 14 at 16-18.

13
14
15
16 ⁴ Moreover, the Court notes that Plaintiff did not challenge the ALJ’s
17 noncompliance finding. Thus, if the ALJ discounted Plaintiff’s reported symptoms
18 due to noncompliance, Plaintiff waived any argument related to the finding. *See*
19 *Indep. Towers of Wash.*, 350 F.3d at 929; *Carmickle*, 533 F.3d at 1161 n.2.

1 At step four of the sequential evaluation, the ALJ must determine the
2 claimant's RFC. 20 C.F.R. § 416.920(a)(4)(iv). "[T]he ALJ is responsible for
3 translating and incorporating clinical findings into a succinct RFC." *Rounds v.*
4 *Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015). "[A]n ALJ's
5 assessment of a claimant adequately captures restrictions related to concentration,
6 persistence, or pace where the assessment is consistent with restrictions identified
7 in the medical testimony." *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th
8 Cir. 2008). An RFC finding need not be identical to a medical opinion; rather, it
9 must be consistent with the medical opinion. *Turner v. Comm'r of Soc. Sec.*
10 *Admin.*, 613 F.3d 1217, 1222-23 (9th Cir. 2010). Therefore, to the extent the
11 evidence could be interpreted differently, it is the role of the ALJ to resolve
12 conflicts and ambiguity in the evidence. *Morgan*, 169 F.3d at 599-600. The ALJ
13 was required to include all of Plaintiff's "functional limitations, both physical and
14 mental" in the hypothetical question posed to the vocational expert." *Flores v.*
15 *Shalala*, 49 F.3d 562, 570 (9th Cir. 1995).

16 Plaintiff contends the ALJ failed to incorporate each of her physical and
17 psychological impairments into the RFC, particularly her inability to maintain
18 attendance and work effectively during the workday and workweek, as opined by
19

1 Nancy Winfrey, Ph.D., John Arnold, Ph.D., and Tushar Kumar, M.D. ECF No. 14
2 at 16-18. This argument is unpersuasive.

3 First, although arguing that the ALJ failed to incorporate the opinions of
4 these three physicians into the RFC, Plaintiff failed to recognize and challenge the
5 varying weight given to each of these doctor's opinions by the ALJ: Dr. Winfrey
6 (great weight), Dr. Arnold (some weight), and Dr. Kumar (partial weight). Tr. 39-
7 40. By failing to challenge the discounted weight given to Dr. Arnold's and Dr.
8 Kumar's opinions, Plaintiff waived challenging the ALJ's decision to discount
9 these opinions. *See Indep. Towers of Wash.*, 350 F.3d at 929; *Carmickle*, 533 F.3d
10 at 1161 n.2 (9th Cir. 2008).

11 Second, as explained below, the ALJ adequately incorporated the functional
12 limitations supported by the record into the RFC. There are three types of
13 physicians: "(1) those who treat the claimant (treating physicians); (2) those who
14 examine but do not treat the claimant (examining physicians); and (3) those who
15 neither examine nor treat the claimant [but who review the claimant's file]
16 (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d
17 1195, 1201-02 (9th Cir. 2001) (citations omitted). Generally, a treating physician's
18 opinion carries more weight than an examining physician's opinion, and an
19 examining physician's opinion carries more weight than a reviewing physician's

1 opinion. *Id.* at 1202. “In addition, the regulations give more weight to opinions
2 that are explained than to those that are not, and to the opinions of specialists
3 concerning matters relating to their specialty over that of nonspecialists.” *Id.*
4 (citations omitted).

5 If a treating or examining physician’s opinion is uncontradicted, the ALJ
6 may reject it only by offering “clear and convincing reasons that are supported by
7 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
8 “However, the ALJ need not accept the opinion of any physician, including a
9 treating physician, if that opinion is brief, conclusory and inadequately supported
10 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
11 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
12 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
13 may only reject it by providing specific and legitimate reasons that are supported
14 by substantial evidence.” *Bayliss*, 427 F.3d at 1216.

15 *1. Dr. Winfrey*

16 Dr. Winfrey reviewed Plaintiff’s longitudinal medical record and testified at
17 the administrative hearing as the medical expert. Tr. 56-64. Dr. Winfrey
18 diagnosed Plaintiff with depression, a bereavement disorder, anxiety, and a
19 personality disorder. Tr. 57. Dr. Winfrey testified that based on Plaintiff’s

1 conditions, Plaintiff had historically only mild difficulties maintaining
2 concentration, persistence, and pace, but with recent auditory hallucinations,
3 Plaintiff was moderately limited in maintaining concentration, persistence, and
4 place. Tr. 57-64. Dr. Winfrey also opined that Plaintiff had moderate difficulties
5 in maintaining social functioning and that her functioning waxed and waned. Tr.
6 57-64.

7 The ALJ gave great weight to Dr. Winfrey's opinion. Tr. 39. Plaintiff
8 argues that, even though the ALJ gave great weight to Dr. Winfrey's opinion, the
9 ALJ failed to include Dr. Winfrey's opined limits regarding social functioning and
10 concentration, persistence, and pace into the RFC. ECF No. 14 at 16-18.
11 However, the ALJ included these opined limits in the RFC. *See* Tr. 39 ("Although
12 Dr. Winfrey did not provide an opinion regarding the [Plaintiff's] mental residual
13 functional capacity, the [ALJ gave] Dr. Winfrey's opinion great weight as it
14 assisted the [ALJ] in assessing the presence and severity of [Plaintiff's] mental
15 impairments, as well as assessing a" RFC.); Tr. 40 ("Dr. Winfrey testified that
16 [Plaintiff's] functioning waxes and wanes, but that in both social functioning and
17 maintaining concentration, persistence, Dr. Winfrey opined that [Plaintiff's]
18 difficulties fluctuated between mild and moderate but certainly did not approach
19 the marked level."). The RFC limits Plaintiff to simple and routine tasks with

1 occasional detailed work, superficial brief contact with the general public and
2 occasional non-collaborative contact with coworkers, independent work with
3 objects rather than people, and ordinary production requirements. Tr. 32. This
4 RFC adequately incorporates Dr. Winfrey's opined limitations. *See Stubbs-*
5 *Danielson*, 539 F.3d at 1174; *Turner*, 613 F.3d at 1222-23 (recognizing that the
6 RFC need not be identical to a medical opinion but rather must be consistent with
7 the medical opinion). Moreover, each of the three jobs identified by the vocational
8 expert based on the RFC—stuffer, toy assembler, and basket filler—involve a
9 Specific Vocational Preparation (SVP) of 1 or 2. The time needed to learn a SVP1
10 job is no more than a short demonstration and a SVP2 job is up to and including
11 one month. 20 C.F.R. § 404.1568(a). These three unskilled positions involve
12 simple work requiring little or no judgment. 20 C.F.R. § 416.968(a). Plaintiff fails
13 to establish any consequential error.

14 2. *Dr. Arnold*

15 Dr. Arnold examined Plaintiff on January 2, 2014, Tr. 543-46, and
16 December 8, 2015, Tr. 1211-14. In January 2014, Dr. Arnold diagnosed Plaintiff
17 with depressed mood and minimal clinical anxiety. Tr. 543-46. In December
18 2015, Dr. Arnold diagnosed Plaintiff with depressed mood suggestive of severe
19 clinical depression and mild clinical anxiety. Tr. 1211-14. Amongst other mild to

1 moderate limitations, Dr. Arnold opined on “check-the-box” forms that Plaintiff
2 was moderately limited in the ability to learn new tasks, adapt to change in a
3 routine work setting, ask simple questions, request assistance, set realistic goals,
4 and plan independently, and markedly limited in the ability to perform activities
5 within a schedule, maintain regular attendance, be punctual within customary
6 tolerances without special supervision, and complete a normal workday and
7 workweek without interruptions from psychologically based symptoms. Tr. 545,
8 1213.

9 The ALJ gave Dr. Arnold’s opinion some weight. Tr. 40. Because Dr.
10 Arnold’s opinion was contradicted by Dr. Winfrey’s opinion, Tr. 57-64, the ALJ
11 was required to provide specific and legitimate reasons supported by substantial
12 evidence for discounting Dr. Arnold’s opinion. *See Bayliss*, 427 F.3d at 1216.

13 First, as mentioned above, Plaintiff failed to challenge the weight the ALJ
14 gave to Dr. Arnold’s opinions. Therefore, Plaintiff waived any such challenge.
15 *See Indep. Towers of Wash.*, 350 F.3d at 929; *Carmickle*, 533 F.3d at 1161 n.2.

16 Second, addressing the merits, an ALJ may discount an opinion that is not
17 consistent with the provider’s notes, the other medical evidence, or the record as a
18 whole. 20 C.F.R. § 416.927(c)(4) (“[T]he more consistent an opinion is with the
19 record as a whole, the more weight we will give to that opinion.”); *Tommasetti*,

1 533 F.3d at 1041 (Incongruity between a doctor’s medical opinion and treatment
2 records or notes is a specific and legitimate reason to discount a doctor’s opinion.).
3 Here, the ALJ found Dr. Arnold’s “check-the-box” opinion regarding the severity
4 of Plaintiff’s limitations was not supported by Plaintiff’s treatment records, the
5 other medical-expert opinions, or Plaintiff’s activities of daily living. Tr. 39-40.
6 Specifically, the ALJ found Dr. Arnold’s opinion that Plaintiff has marked
7 limitations in her ability to complete a normal workday or workweek was in “stark
8 contrast to” Plaintiff’s college attendance for several semesters. Tr. 40; *see*
9 *Morgan*, 169 F.3d at 601-02 (An ALJ may discount a medical source opinion to
10 the extent it conflicts with the claimant’s daily activities.). The ALJ also noted that
11 Dr. Arnold had opined that vocational training would minimize or eliminate
12 Plaintiff’s barriers to employment. Tr. 40 (citing Tr. 545, 1213). The ALJ gave
13 specific and legitimate reasons supported by substantial evidence for discounting
14 Dr. Arnold’s opinions.

15 Moreover, the ALJ need only incorporate those functional limitations that
16 are supported by the record. *See Stubbs-Danielson*, 539 F.3d at 1175. Plaintiff
17 fails to establish how the RFC, which limits Plaintiff to simple and routine tasks
18 with occasional detailed work with objects and with ordinary production
19 requirements, fails to incorporate the evidentiary supported functional limitations.

1 Finally, the three jobs identified by the vocational expert are SVP1 and SVP2
2 jobs—jobs that are learned in a short period of time. Plaintiff failed to establish
3 any consequential error.

4 *3. Dr. Kumar*

5 On July 16, 2011, Dr. Kumar performed a consultative psychiatric
6 examination of Plaintiff. Tr. 482-88. Dr. Kumar diagnosed Plaintiff with
7 gastrointestinal problems, a seizure disorder, and migraines. Tr. 487. Noting that
8 his opinion was based on Plaintiff's psychiatric evaluation and not Plaintiff's
9 reports of physical symptoms, Dr. Kumar opined that Plaintiff has the ability to
10 perform simple and repetitive tasks but that she would have difficulty performing
11 tasks involving computation or math; has moderate to severe difficulty with
12 detailed and complex tasks; can accept instructions from supervisors; is mildly to
13 moderately impaired with interactions with coworkers and the public; is able to
14 perform work on a consistent basis without special or additional instruction; is
15 moderately impaired in the ability to maintain regular attendance in the workplace;
16 is mildly to moderately impaired in the ability to complete a normal workday and
17 workweek without interruptions; and is mildly to moderately impaired in the
18 ability to deal with the usual stress encountered in the workplace. Tr. 487-88.

1 The ALJ gave Dr. Kumar's opinion partial weight. Tr. 40. Because Dr.
2 Kumar's opinion was contradicted by Dr. Winfrey's opinion, which was supported
3 by independent medical evidence, Tr. 57-64, the ALJ was required to provide
4 specific and legitimate reasons supported by substantial evidence for discounting
5 Dr. Kumar's opinion. *See Bayliss*, 427 F.3d at 1216.

6 Plaintiff challenges the ALJ's failure to include Dr. Kumar's opinion that
7 Plaintiff will be absent from work due to her impairments. ECF No. 14 at 18-19.
8 As previously mentioned, Plaintiff fails to challenge the ALJ's decision to discount
9 Dr. Kumar's opinion. Thus, any challenge to the ALJ's decision to discount Dr.
10 Kumar's opinion is waived. *See Indep. Towers of Wash.*, 350 F.3d at 929;
11 *Carmickle*, 533 F.3d at 1161 n.2.

12 Regardless, the ALJ gave specific and legitimate reasons for discounting Dr.
13 Kumar's opinion, i.e., it was not supported by the objective medical evidence and
14 was based solely on Plaintiff's self-reports and Dr. Kumar's one-time evaluation.
15 *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007) (Relevant factors
16 to evaluating any medical opinion include the amount of relevant evidence that
17 supports the opinion, the quality of the explanation provided in the opinion, and the
18 consistency of the medical opinion with the record.). Based on the medical record,
19 the ALJ rationally found Dr. Winfrey's opinion to be more consistent with the

1 objective medical evidence, than Dr. Kumar's opinion. And again, Plaintiff did
2 not challenge the weight given to Dr. Winfrey's opinion.

3 Moreover, by limiting Plaintiff's contact with the public and coworkers and
4 requiring jobs that involve simple and routine tasks with occasional detailed work,
5 which is done independently with objects and with only ordinary production
6 requirements, the ALJ incorporated Dr. Kumar's opined social limitations and
7 waxing and waning into the RFC. Tr. 32, 41. *See Stubbs-Danielson*, 539 F.3d at
8 1175. Plaintiff failed to establish any consequential error. *See id.* (requiring a
9 claimant challenging the RFC to do more than merely restate her arguments that
10 the ALJ improperly discounted certain evidence).

11 **D. Step Five**

12 Plaintiff argues the ALJ erred at step five. At step five of the sequential
13 evaluation analysis, the burden shifts to the Commissioner to establish that 1) the
14 claimant can perform other work, and 2) such work "exists in significant numbers
15 in the national economy." 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran*,
16 700 F.3d at 389. In assessing whether there is work available, the ALJ must rely
17 on complete hypotheticals posed to a vocational expert. *Nguyen*, 100 F.3d 1462.
18 The ALJ's hypothetical must be based on medical assumptions supported by
19 substantial evidence in the record that reflects all of the claimant's limitations.

1 *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). The hypothetical should
2 be “accurate, detailed, and supported by the medical record.” *Tackett*, 180 F.3d at
3 1101.

4 The hypothetical that ultimately serves as the basis for the ALJ’s
5 determination, i.e., the hypothetical that is predicated on the ALJ’s final RFC
6 assessment, must account for all the limitations and restrictions of the claimant.
7 *Bray*, 554 F.3d 1219, 1228 (9th Cir. 2009). As discussed above, the ALJ’s RFC
8 need only include those limitations found credible and supported by substantial
9 evidence. *Bayliss*, 427 F.3d at 1217 (“The hypothetical that the ALJ posed to the
10 VE contained all of the limitations that the ALJ found credible and supported by
11 substantial evidence in the record.”). “If an ALJ’s hypothetical does not reflect all
12 of the claimant’s limitations, then the expert’s testimony has no evidentiary value
13 to support a finding that the claimant can perform jobs in the national economy.”
14 *Id.* However, the ALJ “is free to accept or reject restrictions in a hypothetical
15 question that are not supported by substantial evidence.” *Greger v. Barnhart*, 464
16 F.3d 968, 973 (9th Cir. 2006). Therefore, the ALJ is not bound to accept as true
17 the restrictions presented in a hypothetical question propounded by a claimant’s
18 counsel if they are not supported by substantial evidence. *Magallanes v. Bowen*,
19 881 F.2d 747, 756-57 (9th Cir. 1989); *Martinez v. Heckler*, 807 F.2d 771, 773 (9th

1 Cir. 1986). A claimant fails to establish that a step five determination is flawed by
2 simply restating argument that the ALJ improperly discounted certain evidence,
3 when the record demonstrates the evidence was properly rejected. *Stubbs-*
4 *Danielson*, 539 F.3d at 1175-76.

5 Here, Plaintiff simply restates her argument that the ALJ improperly
6 discounted her symptom claims and failed to incorporate Dr. Winfrey's opinion
7 and Dr. Arnold's and Dr. Kumar's (rejected) opinions. This restated argument is
8 insufficient. *See id.* Moreover, consistent with the RFC discussion above, the
9 ALJ's hypothetical was based on medical assumptions supported by substantial
10 evidence in the record that reflected all of Plaintiff's limitations. *See Osenbrook*,
11 240 F.3d at 1165. Because the ALJ's decision to discount Dr. Arnold's and Dr.
12 Kumar's opinions regarding Plaintiff's daily and weekly attendance abilities is
13 supported by substantial evidence and is not challenged by Plaintiff, the ALJ need
14 not have included these discounted opinions in either the RFC or the hypothetical
15 presented to the vocational expert. Therefore, the ALJ properly did not consider
16 the vocational expert's testimony that an individual missing in excess of one day
17 per month is not capable of maintaining employment.

18 The ALJ's hypothetical was accurate, detailed, and supported by the medical
19 record. Based on the vocational expert's response to the posed complete

1 hypothetical, the ALJ rationally found Plaintiff capable of performing work that
2 exists in significant numbers in the national economy.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court concludes the
5 ALJ's decision is supported by substantial evidence and is free of harmful legal
6 error. Accordingly, **IT IS HEREBY ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

8 2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is
9 **GRANTED**.

10 3. The Clerk's Office is to enter **JUDGMENT** in favor of Defendant.

11 The District Court Executive is directed to file this Order, provide copies to
12 counsel, and **CLOSE THE FILE**.

13 DATED December 17, 2018.

14 s/Mary K. Dimke
15 MARY K. DIMKE
16 UNITED STATES MAGISTRATE JUDGE
17
18
19